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No. 97-1320

Supreme Court, U.S.
FILED
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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

BRUCE W. DAVIS, *et al.*, *Petitioners*

v.

THE CITY OF HOLLYWOOD, *Respondent.*

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SUPREME COURT, U.S.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITIONERS' REPLY IN SUPPORT OF MOTION AND BRIEF OF AMICUS CURIAE

The City lodged objections to the *amicus curiae* brief submitted in support of Petitioners. The motion and brief of the *amicus curiae* were timely filed on April 16, 1998.

The City objects that the *amicus curiae* attempts to inject an issue never raised or addressed by the parties. On the contrary, Petitioners raised the question of the validity of the window of correction in the trial court, before the Eleventh Circuit, and included it as a question presented to this Court (Question 3). Challenging the regulation's constitutionality, challenges its validity. Thus, it is an additional argument on an issue properly before the Court, and falls squarely within S.Ct.R. 37.1.

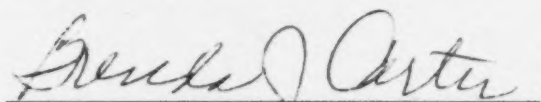
The City also objects that the *amicus curiae* merely seeks an advisory opinion because neither *Auer* nor *Davis* lead to the conclusion on the window that was reached in *Eugene v. McDonald's Corp.*, Case No. 96-2324-CIV-HIGHSMITH (S.D. Fla. 1997), *appeal*

pending, 11th Cir. No. 98-4257. *But see Arrington v. City of Macon*, 973 F.Supp. 1467 (M.D. Ga. 1997), where the court first concluded that under *Auer*, plaintiffs were not exempt as a matter of law, because they had clearly proven the employer had both an actual practice for five years of docking them in violation of the salary basis test, and had a settled policy of doing so. Yet, after that judgment, the court later concluded that as long as the reasons were not lack of work, the employer could use the window later, to avoid all liability. *Id.* 1469-70, 1473-75.

As such, the *amicus curiae* seeks not an advisory opinion, but reversal of *Davis* because of the adverse, recurring and far-reaching nature of the precedent it established. If the *amicus curiae* is concerned about the adverse impact *Davis* has on current and future employees he represents in the private sector, that is a legitimate reason for bringing to the Court's attention additional reasons why *Davis* is bad law, and warrants reversal.

The *amicus curiae*'s motion for leave to file a brief should be granted.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Brenda J. Carter, a member of the Bar of this Court, hereby certify that a copy of the foregoing was mailed, first class postage prepaid, to Joseph H. Serota, Esq., Weiss Serota & Helfman, 2665 So. Bayshore Drive, Suite 420, Miami, FL 33133, counsel for respondent, on May 6, 1998. I further certify that all parties required to be served have been served.

Brenda J. Carter